

Journal of Theoretical & Philosophical Criminology

ISSN: 2166-8094

JTPCRIM, July 2013, 5: 88-103

The overlap between war and crime: unpacking Foucault and Agamben's studies within the context of the war on terror
Teresa Degenhardt* Queen's University, Belfast

Abstract:

This article will consider the current convergence between war and crime by unpacking Foucault's analysis of power and Agamben's elaboration on the conjunction between the banning of a life and the constitution of the polity. It will show that these perspectives link together crime and war as mechanisms that contribute to the governance of the population by legitimating authority and their use of force through the military and the police while excluding part of the population. It will expose how these convergences highlight the problem of the political in the constitution of the social order at the global level. In the current contingency, crime and war are strongly implicated in the crucial political function of calling people to share their similarities and differences, and yet are not the best mechanisms for dealing with the sharing of a world in common.

Key Words

Foucault; Agamben; war; crime; war on terror; international sphere.

Introduction

Almost ten years ago, 9/11 stimulated a vast number of studies and arguments concerning the proper definition of the events that marked that day: was it a crime? An act of war? A clear interpretation of this event was crucial in order to determine the appropriate reaction to it. Was it for the legal system to intervene or for the military apparatus? Despite the fact that the population and media seemed to classify 9/11 as an act of war, thereby providing legitimacy for the launching of the "war on terror", and the following intervention in Afghanistan, many scholars challenged this

interpretation. They questioned not only the act of defining 9/11 and the reaction to it as a “war”, but also underlined how 9/11 should be conceived as a “crime against humanity”, and thus called upon the international institutions to deal with it (Cassese, 2002; Megret, 2002; Slaughter and Burke-White, 2002).

In criminology, the relationship between war and crime has been specifically studied by the pioneer Karl Mannheim in the late 1930s. According to Mannheim (1941), these two phenomena have some crucial differences: war is usually conceived as a group action whereas crime an individual one: “crime is always wrong, war is wrong only according to circumstances” (Mannheim, 1941, p. 6) but, on closer exploration, the pioneer of criminology highlights how these lines of distinction can easily become blurred once we consider that crime can take on the character of war when committed not only outside the group but also inside it (Mannheim, 1941). He concludes: “to a large extent there is no fundamental difference between war and crime, as far as injurious actions against members of the other group are concerned. The opposite of war is not so much peace in its modern sense, but simply the absence of violence” (Mannheim, 1941, p. 11). War and crime are therefore two ways of conceptualising violence towards other humans both within and outside one’s group. Can we still regard these distinctions as valid in the current context of the war on terror? What precisely links war with crime, apart from violence?

In the current war against terrorism, the notion of the enemy and that of the criminal have converged and, with this, the practices of the military apparatus were utilised in conjunction with the techniques of arrest and incarceration that are typical of the criminal justice system. Since the start of the war against terrorism, states actions have been directed against enemy states but also against unlawful combatants, thus blurring the enemy-criminal distinction. The definition of certain states as rogue seems to be calling for some form of sanction. Military operations against states comprised a range of practices typical of the criminal justice system, legitimised for reasons of national defence: indeterminate detention, arrest warrants, and rendition flights for suspected terrorists, to name but a few. This happened not only in war zones but also within national borders. Conversely, techniques that were more traditionally employed during military conflict have increasingly begun to be practised within national borders: shoot to kill policies, limitations on free speech and association, and continuous surveillance. The military were sent abroad to conduct a war that soon became a policing mission, and started to be utilised within national borders alongside the police to fight terrorism. Increasingly, the demarcation between war and crime control has become blurred. This has occurred to such an extent that, in Germany, a lawyer has started to conceptualise the “criminal law of the enemy” (Jakobs as cited in Krasmann, 2007), whereby it is proposed that a new paradigm of security should be legitimised for the total exclusion of dangerous individuals. “Enemies are currently non persons” he claims (Jakobs as cited in Krasmann, 2007, p. 303). “They are people who are seen as not submitting to the logic of the system and thus need to be reserve a different treatment.”

These new rationalities emerging from the war against terrorism, but not limited to that (Jakobs indeed started theorising this previous to 9/11), underline how close we are to launching war *ad personam*, on one side. On the other side, some people are calling for war to be defined as a crime; both at the street level through demonstrations (consider the Iraq War and the demonstrations staged around the globe in February 2003) and also through legal means, i.e. the establishment of the Iraq Inquiry (Chilcot Inquiry) to consider the circumstances that led to the war; the refusal of Desmond Tutu to attend a conference to which Tony Blair had been invited, stating that he should face trial for the Iraq War; or the historic agreement signed in Kampala in 2010, making waging aggressive war a prosecutable crime under international law. The distinction between crime and warfare has become far more complex than it was when Mannheim was writing, and it is punctuated by reference to law and politics in both directions.

Notions of war and crime are used to define violence in the international sphere, and military and carceral practices follow these definitions in a hybrid, blurred way. There is not only war as the

prerogative of the sovereign and a challenge to it, but there is also an increasing sense that war should be banned from international relations. Conversely, it is increasingly being conceptualised as a mechanism of law enforcement for intervening in humanitarian crises and preventing human rights violations. War is not only used to maintain sovereign power but also to protect the individual both within and without its national jurisdiction, by its state but not only; it is not only conceived as a tragedy but also as the only solution. It is not only rejected for the violence it brings to humans and the destruction to their infrastructures, but also used to protect and save human beings from violence and abuses of power. As Hayward and Morrison (2002) suggested, crime and war are no longer stable categories, but merely concepts used to reassert the traditional divisions of governance, between the violence that can be used inside and outside, respectively. The status of these two phenomena demands reconsideration and re-articulation in the context of the war on terror and of the international scene in general.

As it will be impossible to address the issue fully within this relatively short article, I aim to unpack Foucault's study and its subsequent elaboration by Giorgio Agamben. I have selected these authors as they have most directly addressed the issue of war and crime within the context of governance. I will first consider Foucault's analysis of power and some of his well-known explanations of how society is governed through the fight against the outlaw. Later, his recent elaborations on war will also be scrutinized. Foucault is known mainly for distinguishing between sovereignty, discipline, and governmentality, as the successive forms of power and modalities of control.

However, the publication of his latest lectures, *Society Must Be Defended* (2003) and *Security, Territory and Population* (2007), have challenged this rendition of the distinctions between the different forms of power by opening up space for an analysis of these as coexistent and intertwining. It is this interpretation that I will adopt here.

Following this, this article will explain how, according to Agamben, the construction of political community is fundamentally based on the banning by the sovereign of a subject outside its jurisdiction and legal protection, thus highlighting how contemporary democracies could potentially turn into death machines (Agamben, 1998; 2005; Aradau and van Munster, 2009). These joined perspectives will enable us to map out some of the conjunctions between the reactions against disorder both inside and outside the national dimension. By doing so, I aim to create an overarching picture of the highly ambiguous relationship between law, war and crime as well as the intertwining of the national and international sources of this ambiguity. In the final part of the article, I will examine different ways of producing politics and justice through the lenses of Badiou and Agamben's philosophies. The article argues that current contingencies press us to articulate different political imaginaries that are capable of producing the common world without recourse to separative names.

The Criminological Context

The strict relationship between war and crime has become apparent especially in relation to the use of the metaphor the "war against crime" in political campaigns. The multiple critiques of the use of such language have underlined the practical disastrous consequences of employing this political technology and mentality (the militarization of the police, the radical transformation of the criminal justice system and of democratic government) (Kraska, 2001; Simon, 2007), but it has been evidenced also how this strategy had been used by governments to legitimize their actions in times of instability or their capacity to fight crime (Beckett, 1997; Hall, et al, 1978; Parenti, 1999). Differences have been suggested in relation to the war against cancer and arguably differences in approach could be evidenced in relation to the "war against poverty". However, recently, scholars have revisited the critique of the war on crime in relation to the launch of the war on terrorism, arguing that the two are disastrously following similar lines of action (Huq and Muller, 2008; Simon, 2007). In particular, Simon's (2007) seminal new book has highlighted the extent to which the refrain of the war against crime has swept into civilian life and corroded the democratic principles under which the United States was meant to function.

Interpretations of 9/11 and the violence that followed varied. Some analysts suggested that 9/11 compelled the world to consider the project of a global criminal justice system and the prospect of global security, thus encouraging the further development of international law and global institutions (see Slaughter and WhiteBurke, 2002). Others scholars purported that the current military invasions were *de facto* mechanisms for constructing the sovereign in the international sphere (Sparks, 2006; Welch, 2007), while yet others claimed that 9/11 provided a catalyst for the development of the global policing of crime (Deflem, 2010) before the proper rule of law was established. Along a very different line of thought, some analysts proposed that the military operations taken to counteract 9/11 should be considered state crimes, both for violating international law and for the killing, destruction and harm they produce (Green & Ward, 2004; Kramer & Michalowski, 2005; Ruggiero, 2005; Sands, 2005). Amidst these varied interpretations, some concurred with the fact that the military action that followed 9/11 was to be conceived as a mechanism for enforcing international law and sovereignty whereas others claimed that it constituted a violation of international law. How is this instability of concepts possible? What does this overlap between war and crime reveal?

Following Agamben's analysis of the *State of Exception*, a recent article by Aradau and van Munster (2009) underscored the view that exceptional practices may lie at the origin of law, despite evidently being violations of the law. Aradau and van Munster suggest that counter terrorism military operations are, at the same time, state crimes and mechanisms for establishing some sort of legal system in the international sphere (Aradau & van Munster, 2009). They suggest that there is a continuum between a fundamental crime and the institution of a legal and political system. Following this interpretation, I will unpack Foucault's and Agamben's work and utilise it to interpret the current war on terror as a manifestation of this overlap and as an occasion for redirecting questions on the relationship between politics and crime. I argue that the debate around whether military action and counter terrorism operations constitute war, a rudimentary form of international criminal justice system and law enforcement, or conversely state crimes highlights how far the notion of crime and war are involved in funding and shaping the borders of the political community. The current contingencies force us to reconsider the crucial nexus between crime and politics, and to return to Matza's (1969) argument on the importance of studying crime in relation to the working and theory of the state. This obviously links to the recent literature on criminology, whereby there is an acknowledgment that the borders between crime control and war are becoming increasingly porous (Simon, 2007), on the function of the "enemy-within" or "suitable enemies" (Christie, 1986) in the constitution of society and the legitimation of political elites, and on the status of war within criminology and on the criminogenic character of war (Jamieson, 1998; Ruggiero, 2005), but crucially it expands this literature by considering not only state based configurations, but also the state of the international in the context of the war on terror.

Unpacking Foucault on crime and war as a mechanism for governing society

According to Foucault, the relationship between crime and war could be visualised as a continuum which is based on the function that these play in the constitution of society and in the legitimation of its institutions. Famously, Foucault, in *Discipline and Punish* (1977), describes how prisons and the application of prison regimes create, maintain and control a class of delinquents which allows the control of the whole of society. According to this analysis, prisons function as practices that signal and construct a class of the population that is particularly dangerous compared with the rest. Foucault suggests that this process is crucial in creating the idea that the criminal is ontologically different from the rest of the population. The line of demarcation is attributed to the criminal on the basis of its status as the enemy of society, already pointing in the direction of the crucial association between the two. In this part, Foucault's analysis strangely seems to reinvigorate some of Beccaria's thoughts, which lie at the basis of the liberal understanding of criminal law: "the criminal injures society first of all; breaking the social contract,

he sets himself up in society as a domestic enemy” (Beccaria in Foucault, 1994, p. 27). This is the case, as Foucault explains how the switch from understanding crime as an attack against a private person to crime as an attack against the whole of society is related to the development of the discipline of criminology, which is in turn linked to the government of our society (Garland, 1988). Foucault remarks here that crime is to be related to the constitution of society itself: by entering a political community, we have adopted a conception of crime based on the idea that an individual who breaks the law sets him outside the social contract and *enters into war* with society. The perception of crime as a declaration of war on the whole of society is, to some extent, the basis of both the construction of our social bodies and the discipline of criminology.

Foucault’s point is rather different from the liberal vision, however. The delinquent is not the enemy; the delinquent is produced as the criminal by a number of social practices and techniques actualised through the prison system. These practices are operationalised on the body of the condemned as a way of managing the subject and disciplining him, and contextually these give shape to the delinquent as a subject; information collected by professional observations on the subtle abnormalities that prisoners may manifest coalesces to configure the idea of the criminal as a deviant and degenerate. This information is later used to establish signs of abnormality among the population and select the deviant to be placed under control in different social institutions, from the schools to the barracks and hospitals. It is against this “internal threat” (or “internal enemy”) that the state legitimates its use of force (Foucault, 1977,

p. 285), and also the proliferation of numerous licit illegal practices by the police and authorities (Foucault, 1977). It is for this reason that Foucault provocatively states that “criminality becomes one of the mechanisms of power” (Foucault, 1997, p. 283), because the existence of the criminal enables the use of violence by the authorities for the maintenance of peace and order.

I argue that Foucault expressed a similar understanding of the function of war in relation to its capacity to determine the outside of the political community. Foucault’s understanding of war is not linear and can be reconstructed from a plurality of sources, such as *Discipline and Punish* (1977) and *History of Sexuality I* (1979), but especially from his last published lectures, *Society Must Be Defended* (2003) and *Security, Territory and Population* (2007). In *Society Must Be defended*, war is represented as an expression of the sovereign power to kill an enemy race, which is coterminous with the use of bio-power within the state. By bio-power, Foucault meant the power to “make live and let die”, which entails the government and reproduction of social life through specific security mechanisms and modes of subjectification. I will explain in detail later how this is related to war. Conversely, in the lectures *Security, Territory and Population*, war is only touched upon at the beginning in relation to the historical development of sovereignty and law. From these two series, notwithstanding references to the notion of war being diverse and dispersed, it is possible to trace the continuum between crime and war. Foucault suggests that war and crime are both functional in selecting a group of outsiders – one within the nation state and one outside it, i.e. the enemy group. These different groups – the dangerous class and the other race – are the basis upon which social order can be established, power can be legitimated and homogenization achieved. It is upon the construction of these categories of the excluded that the continuum between war and crime rests as the facilitator of the processes of governance.

To Foucault, our social order is constructed through war against an enemy group, a group which was constructed as the “other race”. Foucault stated that the power to kill was exercised through the strategic distinction within the human race of a different group, determined as savage and barbarous in contrast to the civilised. He further explained: “The other race is basically not the race that came from elsewhere or that was, for a time, triumphant and dominant, but that it is a race that is permanently, ceaselessly infiltrating the social body, or which is rather, constantly being re-created in by the social fabric” (Foucault, 2003, p. 61). This construction is what shows how, at the same time as war being is launched outside the nation, inside the state, the population is constructed in bio-political terms, or as a naturally uniform population. The social body is constantly infiltrated by the image of the savage against which the

rest of the population is called to conform to a single national identity. The social group is infiltrated by this distinction – of those who are perceived to be inferior on the basis of their belonging to a specific racial category. The very constitution of nation states is based on a national identity carved against the enemy group. This structuring of the population coincides with the use of security tactics which organise space in relation to possible future events to be managed to preserve the population: such as birth, death, and health hazards. If the national as a homogeneous political community was constructed and governed on the basis of these two lines of exclusions, in the context of the international, these two outsiders are used simultaneously. Indeed, international relations scholars have suggested that the war on terror represents a way of shaping the social in the global arena (Dean, 2007; Jabri, 2007; Neal, 2010; Reid, 2006) but, in the case of the war on terror, if forms of exclusion enable the power to kill of the sovereign, thus relocating authority within the international and attempting to disciplining its subjects, in this context, the sovereign is constituted by a plurality of states (each based on its previous forms of exclusion) and thus exclusion has different effects in different national contexts, as new categories overlap with old forms of exclusion. I will elaborate on this later.

As we have seen, Foucault regards war as at the basis for our social order, and moreover as being strongly linked and intertwined with the law. To Foucault, “political power does not begin where war ends...The organization and juridical structure of power, of States, monarchies and societies, does not emerge when the clash of arms ceases. War has not been averted. War obviously presided over the birth of states: ‘rights, peace and laws were born in the blood and mud of battles” (Foucault, 2003, p. 50). Foucault’s revision of Clausewitz’s formula helps to reveal how law originates in conflict and battle rather than from a consensual pact. By doing so, Foucault challenges an understanding of the law as a product of consensual politics, making apparent how order is often the result of violence, blood and victory. Thus, to him, war and the law are set in a continuum: there is no caesura between war and law, as legal provisions have been imposed from real victories and defeats between contending factions. War and law are intertwined, one depending on the other, and violence lies at the origin of order.

This continuum can be seen clearly in the recent invasion of Iraq, where the Coalition operated to change substantially the legal system in the country and train judges and lawyers. The Coalition Provisional Authority approved of a mechanism for establishing the rule of law in the country according to human right standards, and established a Central Criminal Court following the model of the Higher Court in the US. Additionally, various Commissioners were sent from the US to redesign the judiciary (NPR.org, 2008), and judges were trained by American programmes to rebuild and establish a “proper legal system” (New York Times, 2006). Hence, it was the success on the battlefield that allowed the American administration to direct Iraq towards a different legal system, and design legal institutions that were more effective in the fight against crime and insecurity (see Iraq National Intelligence Service, Office of the Administrator of the Coalition Provisional Authority). The interesting aspect here is that, though that the Coalition felt legitimated to impose a specific national law as a way of maintaining international human rights standards, and similarly went to war with the declared aim of enforcing the UN Resolution, the war which initiated the process could itself legitimately be seen as a violation of international legal principles (see Sands, Rothe & Mullins).

Recently, Giorgio Agamben explained this link by expanding Foucault’s study. According to him, not only does the legal system originate fundamentally from violence but also from a threshold in which the legal and the illegal coexist. Agamben suggests that this happens through the exclusion of some groups against which extreme violence can be directed with impunity. If, according to Foucault, it is the existence of a selected enemy that allows for the exercise of war, freeing society from the peril of the social struggles inside; allowing the constant normalization of society and its control through its “purification”, for Agamben, the crucial step is the selection of the *homo sacer* (the bare life) and its abandoning of it to death at the sovereign’s will. This selection is what contributes towards determining the polity and its borders by signalling the outside of the

social similarly to what Foucault explained happened in the case of the delinquent or the savage. Let us now consider how this occurred in greater detail.

Giorgio Agamben on the separation of the bare life and the continuum between the legal and the illegal

Giorgio Agamben sought to explore what happens between sovereignty and biopower (Agamben; 1998), an issue that Foucault failed to cover, despite his admission that the two may co-exist simultaneously. His analysis has mainly been elaborated in his trilogy: *Homo Sacer: Sovereign Power and Bare Life* (1998); *The Remnants of Auschwitz* (1999) and finally *The State of Exception* (2005). It should be noted that the first of these works appeared during the humanitarian mission in the former Yugoslavia and the second after the war on terror had begun. His work has resulted in a revision of the idea of sovereignty and bio-politics as opposed entities, and the paradigm of the state of exception is useful for understanding this connection. By the phrase 'state of exception', Agamben (2005) refers to a juridical figure which allows the sovereign to operate at the threshold of politics and law via actions that are both legal and illegal, which is seen as the "original means of inclusion and capture of forms of life into the political structure" (p. 1). I will explain later what he means by this. Let us now start from the beginning.

In *Homo Sacer*, Agamben establishes that sovereignty and bio-power are not only coexistent but also connected. Bio-politics (the determination of a bare life) is the sacred formula by which sovereignty and the community were constituted. The gesture by which the sovereign "separates" a human life "from other human beings" (Agamben, 1998, p. 86) and makes it killable by anyone with impunity is constitutive of the political community. The decision upon the form of life to ban is the decision upon the limits of the political community and the legal system; it is a decision that establishes the borders of the polis. Branding someone as "outside" the legal order is the mechanism by which the sovereign implicitly includes that form of life that escapes its power, thus maintaining itself as sovereign/in control. Agamben (2003) stated that George Bush's determination of international terrorists as "illegal combatants" is a manifestation of that power. The order which deprived some individuals of any legal status, considering them neither prisoners of war, nor criminals, represents a way of constituting sovereignty and the political community.

In his *State of Exception*, Agamben (2005) evidences how this mechanism, which is at the basis of the constitution of our democratic society, presents a fundamental contradiction: the possibility of the sovereign's launch of a civil war against a specific population as a way of eliminating political adversaries. He shows that our liberal democratic system has at its core the possibility of turning into a totalitarian regime. This conjuncture is elaborated mostly through the work of Carl Schmitt and his definition of the sovereign as the one who decides on the exception. Basically, the state of exception is to be related to the fundamental political decision by the sovereign to authorise excessive violence and the denial of rights over a group of people through recourse to the notion of necessity. To Agamben (2005) the "*State of Exception*" exhibits a typical *modus operandi* of the sovereign in which the legal and illegal coexist. The contemporary philosopher claims that this very possibility is part and parcel of our legal system and lies at the basis of our rule of law.

"In truth, the state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other" (Agamben, 2005, p. 23).

The definition of necessity is a moment being characterised by claims to be within the legal order despite its violation of the same. This is why Aradau and van Munster (2009) claim that, at the basis of our legal system, there is a fundamental crime.

This analysis explains how the current practices of violence have been rendered as both violating and executing the law. However, the most important point is that Agamben highlights how, within our legal system, there is always the possibility of a return to the use of violence and force without any reference to the law. Thus, if the law was founded by war for Foucault, for Agamben, war can dangerously re-emerge from the legal system. The mechanism of a state of exception is what reconnects the legal order to the social order when the connection has been broken. At the basis of the definition of exceptionalism, and from it, stems its illiberality: the political decision by the sovereign. It is the sovereign (or whoever incarnates it) which has the ultimate power to authorise discrimination and the use of exceptional violence against an enemy population. Agamben suggests that this contradiction is intrinsic to our democratic order and the reason why it turning violently totalitarian is a constant threat.

So, for instance, the tactics deployed as part of the war on terror, such as detention in Guantanamo bay, torture as testified by various memos, and the use of drones to kill suspects without trial, are all violent mechanisms legitimated in the light of the state of exception that the war on terror epitomises. Yet, as many have pointed out, these are foundational moments by which the globe is called to unite against a common threat which defines its borders. Thus, these exclusions of specific forms of life contribute towards establishing solidarity and homogeneity among the population and establishing the polity to come. What Agamben makes clear is that similarities and a sense of belonging in liberal democracies cannot be established without the fundamental exclusion of some (Mouffe, 1998). Crucially, Agamben's elaboration challenges the view that liberal democracy is the only political regime able to guarantee human rights and civil liberties for its citizens, by exposing the contradiction upon which these rights and liberties are based. Democracy appears in fact in his analysis as being fundamentally based on exclusionary politics and the possibility of using violence to re-establish power. As Chantal Mouffe (1998) underlines, "what is important to construct the polity is the line of demarcation and not the nature of homogeneity." His argument is useful in demonstrating how not only the enemy but also the criminal are constitutive parts of that order. This argument shows the pitfalls involved in calling for a global system of justice to form a way of controlling violence in the international sphere. Rather than eliminating violence, it may indeed legitimate violence by some specific authorised institutions and further forms of exclusion in absolutist ways.

Recently, many international relations scholars have used Foucault and Agamben to make sense of the current practices of violence in the international sphere (Bigo, 2008; Dean, 2007; Dillon & Neal, 2008; Dillon & Reid, 2009; Jabri, 2007; Neal, 2010; Reid, 2006). The general tendency is to view these acting security mechanisms as forms of bio-politics or governmentality. Dillon and Reid (2009) regard the current wars in Iraq and Afghanistan as expressions of bio-political power in that they unleash the power of death of the sovereign to protect its constituency and guarantee its existence under a deadly threat. Reid (2006) highlights how humanitarian missions are implicated in constructing some populations as worth living and others as abnormal, barbarous or dangerous. By this analysis, the notion of humanity is a form of subjectification enforced by liberal regimes, by which "life is subjected to principles deriving from the organizational needs of those regimes for increased efficiency in preparation for war" (Reid, 2006, p. 18). On a similar line, Jabri (2007) affirms that war is a form of governmentality, by which the control and pacification of populations are achieved beyond the national sphere. She maintains that governance is enacted through the creation of a caesura within the global population, along race lines, which enables the exercise of bio-power and hence the government of the population. The notion of race is here re-worked as cultural difference, in terms of cultural supremacy. Andrew Neal (2010) proposes a slightly different rendition of the current practices of war by explaining that the reaction to 9/11 in the form of war and the practices of torture in Guantanamo are a "unique transformation, correlation and synthesis of everyday practices of disciplinary power with a more distant reawakened modality of symbolic and spectacular bodily vengeance" (Neal, 2010, p. 134). He claims that the practices of contemporary exceptionalism are a way to "apprehend, investigate, punish and restore law and order" (Neal, 2010 p. 133), thus pointing out that the current

manifestation of power is a recombination of the different forms of power and not only bio-political manifestations. If I understand these renditions correctly, they all seem to concur in understanding violence as a mechanism for controlling populations (i.e. governmentality) and shaping them according to the specific and culturally determined idea of subjectivity: i.e. that defined by the notion of human rights, as a liberal notion which unmasks the specific white western conception of the human. However, my view is that these practices, which are indeed a sign of unified governmental ambitions, do produce rather contradictory and ambiguous results.

Indeed, amidst the general calls opposing international terrorism and the protection of human rights, war has been launched against two main countries but security practices have been enforced in different national contexts. These practices seem to distinguish those who pertain to a radical stream of Islamism – as religious activism opposed to western ways of living or having a specific skin colour – as a sign of either belonging to this radical view or to a specific geographic area, which were designed as dangerous. This operationalization of the banning produces contradictory effects in the diverse geographical and political contexts in which it is applied, as this new form of exclusion overlaps previous ones. So, for instance, in Afghanistan the Northern Alliance targeted foreigners, such as individuals from Saudi Arabia; in Pakistan, people were arrested for coming from or having travelled in Afghanistan in 2001 (the Tipton Three is the most obvious example) or for being from a specific tribe; in England and the US, people are considered dangerous on the basis of wearing specific religious insignia or having a brown skin, as tragically testified by the shooting of Jean Charles the Menezes or the numerous cases of people being barred from boarding a plane because of their religious attire. Further East, in China, the Uighers, a minority Muslim group, was targeted by the authorities and sent to Guantanamo. The determination of the enemy group creates different borders in different national and cultural contexts, as the global lines of exclusion overlap with the national and local ones, and specific bodies are selected as exemplifying the barbarous and dangerous others. Thus, the use of traditionally country based forms of governance at the international level attests to the failure of these regulative ambitions. It exposes the existence of a multiplicity of modalities' sovereign's exclusions and reminds us of the complexity of the international sphere.

A pastiche of governance practices and the problem of politics in the international sphere

To return to our initial questions (what links war and crime apart from violence? In what ways do they differ? How could the relationship between the two be conceived in the current global context?), unpacking Foucault's and Agamben's studies has been useful in identifying a few points of contact between these two forms of violence: their function in identifying a group of outsiders as well as their relationship to governance and ultimately politics. Linking the two helps to map the line upon which security mechanisms are placed within and outside the population: the line they contribute to drawing within the population to establish which forms of life should be separated from the social as either the enemy or the criminal. Whereas the enemy contributes to defining the identity of the population inside the state, determining the biological unity of the group against forms of life which are considered racially different and as such savage, the determination of the criminal illustrates the abnormalities of the ones who are dangerous and degenerate. In the context of the war on terror, these mechanisms are transposed at the international level but, by doing so, they are made to overlap. Thus, if some scholars have pointed out how the war on terror represents a constitutive moment of the social at the global level, in that it helps to re-shape the subjectivities and forms of control, our unpacking rather suggests that these techniques may result in a far more ambiguous and contradictory effect. These gestures of banning rather than transposing governance through exclusion seem to create a pastiche of governance in which a multiplicity of sovereign decisions are in place and, with that numerous lines of distinction of the criminal-enemy group. At times, exclusion is on a cultural and religious basis; at others, on old-time national identities and forms of belonging; and at others, discourses on human rights are also utilised so that the liberal notion of the subject becomes yet another normative point of reference.

The war on terror is intertwined in curious and at times contrasting ways with the emergence of a transnational discourse, mostly advanced by nongovernmental organizations such as Amnesty and Human Rights Watch, but also used by some international governmental institutions such as the UN or EU, which highlights the need to protect individuals independently of the state to which they belong. These discourses which are part of that peculiar body of law which is international law tend to encourage an interpretation of war as either a law enforcement mechanism or extreme crime. In conjunction with this, there are a number of processes of the juridisdictionalization of war by which trials and convictions as much as truth and reconciliation processes follow and sometimes become intertwined with the conduct of military operations. The novelty of these processes requires

an understanding of the relationship between politics and law, local and cosmopolitan justice, collective guilt and individual responsibility, making history and performing justice, legitimating dominant forces and permitting expression of dissidents views; between war crimes trials and show trials, the conviction that war is a crime and that war at worst is an error. (Simpson, 2007, p. 1)

Violent practices in the international sphere, the legal discourses by which they are either supported or condemned, and the judicial practices which are involved represent not only a global or quasi aspiration to construct a world political community on the basis of legal western parameters such as human rights, but most importantly a thorough rearticulation of the ways in which authority, the political community and norms are conceived and exercised. Yet, these discourses and practices are being increasingly legitimated at the international level. As confirmed by Ruti Teitel (2011), international criminal law offers a normative order and stability for the current practices of violence, an order which has the advantage of offering protection to any human. Yet, this understanding will similarly reproduce forms of exclusion. In that horizon, outsiders would be the law breakers (criminals), the ones who challenge the law, who would then be seen as contrary to humanity in an absolutist sense. That would be a recipe for enabling extreme violence. Nevertheless, the general view is that the western liberal form of order constitutes the best aspiration for the global political community to come.

Furthermore, the recent Arab Spring seems further to manifest the desirability of the liberal idea of order, as that where individuals are entitled to basic items and freedom. These events and their interpretations parallel and to some extent intersect with some of the discontent currently felt in western societies (the Occupy movement in the US and the various uprisings against Austerity in Europe), through which it has become obvious that democracies are but a empty formula for legitimizing the *de facto* rule by capitalist enterprises and certain professional elites. The contradictions and ambiguities of the current social discontent seem to manifest the need to reformulate the ways in which politics are conceived and articulated at the international level. Rather than following uncritically the view that the western legal system provides the best mechanism for accommodating human needs, we should see the current overlap and ambiguities between war and crime as a sign of the need to rearticulate the political in the international, and as an opportunity to define the wider social processes (usually codified under the banner of globalization) which have created a great challenge for the western distinction between state autonomous units, as a matter for political discussion and solution. Even more, it may provide an opportunity to re-think the ways in which politics and the political are structured.

The merging of discourses about crime and war and their punctuation by legal discourses is but a symptom of the attempt to establish the world as a political community for uniting the international population. However, currently, there are two diverse regulative systems in place: one is state-determined, whereby is the sovereign who decides the exception, and the other internationally-based, produced by the plurality of sovereign states and claims to superiority of the state's determination. The current battle between state-based and international law are merely producing massive levels of violence both inside and outside the national territories, at the hands of the state and international institutions, following national devils and international ones, and at times the intersection between the two. Indeed, discourses of legality and human rights are

implicated in legitimating a criminal justice system at a global level, which is implicated in the re-articulation of the power of the state and its use of force as well as in the distinction between legitimate and illegitimate wars, but they also encompass the uses of the military, the processes of recognition of authority, the form of an individual's association, people's subjectivities and the relationship with the various "others". In the current context, in which the local, national and global dimensions overlap as much as the categories that used to shape and define the modern landscape of governance have become blurred, we are now faced with unstable categories of violence (law, war and law, crime and war, crime and law) and the hybridization of the paradigms and modalities of control. Is it possible to act politics differently without renouncing the aspiration of a global community? Is it possible to imagine a politics for a "coming world community?"

Towards a politics to come?

One thing is clear: we are still trapped in what Alain Badiou (2001) calls "ways of establishing universal systems of representations against a constructed *worst evil*." By this, the contemporary philosopher means that the ways in which we produce politics – and the generic – is still based on the use of "separative names", such as Islamist, Muslim, Arab or Rom, and/or black, or establishing Truths according to paradigmatic forms of crime such as the extermination of the European Jews by the Nazis (Badiou, 2001; 2011). According to Badiou (2001), politics – as much as justice – should instead be about eliminating separations; it should be about affirming a generic character of some sort of *universal truth*. The generic should be sought in the common pursuit of good, rather than the avoidance of evil. Currently, we are assisting a revised formula of what Matza (1969) described as the state's production of good,ⁱ but one that is placed in the context of the international. A hegemonic state – the US – supported by other western nations, bans the "international terrorist" or the "murderous tyrant" to produce a specific "collective representation" of what "evil" is, and thus legitimises a determined interpretation of international law and its warriors as pursuing progress and the common good. This process is what authorises specific forms of power and understanding of evil as an *a priori truth*, as defining an evil is in fact a simulacrum of truth (Badiou, 2001, p. 77), and as such produces exclusion. Rather, we should attempt to produce what Badiou (2001) calls "*an ethic of truth*."

So, what does Badiou (2001) mean by *an ethic of truth*? How does this differ from the truth which subjugates forms of knowledge and opinions? What Badiou refers to is not truth in the Foucauldian sense of "regimes of truth", or knowledge implicated in the exercise of oppressive and productive power; it is rather a political process connected to *an event*. An event is something unprecedented and unpredictable which shakes profoundly the state of things, transforms forms of existence, of communication, and of sociality, which breaks with history, but the event itself is also enigmatic and not "knowable/communicable" as such. There is always in it a void which is unnameable. Nevertheless, the event implies the power to re-shape our understanding of our mode of existence and of the world (Badiou, 2001). Previous examples in the field of politics are the French Revolution, and, more recently, May 68. These were important events that deeply shook our understanding of what politics was and is. Importantly, the ethics of truth allows, rather than constrains, the expression of different understandings of truth and the multiplicity of opinions, in virtue of that unnameable void to which the event is always connected. This is the part of the event that cannot fully be articulated, and this is what generates politics or the possibility of communication of a plurality truth according to the different interests at stake. Hence, Badiou does not regard truth as an absolute nor as able to determine all of the elements of the situation, but recognises *that it is a process of truth rather than the absolute idea of truth*. However, he revives the idea of something which breaks with history and, as such, demands a different perception of people's existence. The point is that the event demands of subjects that they re-shape their existence in relation – in fidelity, says Badiou (2001) – to it without knowing or naming their form of existence. It should be pure fidelity to the event and to life for how it develops always "beneath good and evil" (p. 85).

The commonality of air, oxygen, or the Earth compels us to conceive our subjectivities beyond our belonging to a territorial domain or state; they open up "the impossibility of separation"

and the disappearance of “separative devices”, at least at the world level, so issues such as climate change should as opening up the unfolding of different opinions and understanding of the world we all share, without allowing notions of right or wrong to enter the picture. Some people will have different understanding of what that means, but that is unimportant; what is important is that it does not bring to the table a specific articulation of subjectivity. Badiou (2011) describes the movement aspect of the Arab Spring as political events. These were not about democracy, as we know it, as the uprising in Turkey has recently demonstrated, nor even about being for or against Islam. They are something still unfolding: what they will bring remains uncertain. Yet, these current uprisings represent moments in which what did not exist before comes to light. They manifest a commitment to define what is possible in new ways. These movements have not yet produced a coherent idea about different “political structures”, able to mediate this need for a different world and extend its durability through time. They are probably searching for the political idea which could make people’s existence more intense, less in contrast to current practices of governance, and give them visibility in terms of how they are. Nevertheless, they have opened up history again, and with that they have brought to the fore the passion for the universal and will possibly bring a new modality of thinking about collectivity regarding how it will not take over individuals’ lives.

Agamben (1993) seems to agree with this point when he reflects on “The coming Community,” arguing that the problem of politics lies with language and its pretention to stand for a whole group of singularities. This is what generates the paradox of the conjugation of the universal and the singular. The concept takes its autonomous form of existence which is unable to explain the object it is meant to signify: i.e. it is unable to comprehend all possible forms of existence of the singularities it is meant to represent. For instance, the concept of human beings aims to represent all individuals, but at the same time makes the individual something different from its possibility of being, as it is made to coincide with the generic (Agamben, 1993). The single individual is transformed in a class, defined by the common propriety of its members. In this sense, the attempt at comprising all human beings in a collectivity such as humanity means tragically excluding forms of existence of the singular and contextually diminishing what a single individual may be. For this reason, the problem of politics cannot be left apart from this aporia of language. At the end of his book “The coming Community”, Agamben (1993) states that the politics to come can only be based on singularities – which do not hope to be contained by language – but merely wish to be as they are – *whatever* – without being referred to a common property, but as the *pure possibility of existence*. To him, the coming global community should not be named; it should rather be constituted by singularities who communicate as exemplars without being linked by any identity, but rather being expropriated by all identities as a way of capturing their belonging (Agamben, 1993). This seems to tally with Badiou’s (2001) claim that we should aim for a world to be manifested in its materiality without attempting to exclude the evil, but rather to comprise the evil as part of the form of existence of the world. Only when things can capture and be fully in their materiality will pure good appear on earth (Agamben, 1993).

These reflections may open up space for a different politics, one of the world to come, not a normative politics, but a tentative one; a place where anything can unfold, where the micro and macro dimensions of being can manifest themselves without a specific end. This may be a promising way to link politics and the search for the common good in ways which enable the emergence of different communities and collective forms of being, ones that are not built upon fundamental identities and forms of exclusion/separation. Of course, it is expected that different forms of knowledge will then emerge to respect this new configuration of good and that a farewell to criminology will then be in order.

References

- Agamben G (1998/1995). *Homo Sacer. Sovereign power and bare life*. D. Heller-Roazen (Trans.). Stanford, CA: Stanford University Press.
- Agamben G (2005/2004). *State of Exception*. K. Attell (Trans.). Chicago, IL: University of Chicago Press.
- Agamben, G (1993/1990). *The coming community*. M. Hardt (Trans.). Minneapolis, MN: University of Minnesota Press.
- Aradau C. & Van Munster R. (2009). Exceptionalism and the 'War on Terror'. Criminology meets international relations. *British Journal of Criminology*, 49, 686-701.
- Badiou, A. (2001) *Ethics. An essay on the understanding of evil*. London, UK: Verso.
- Badiou, A. (2011) *Il Risveglio della storia. filosofia delle nuove rivolte mondiali*. Milano: Ponte Alle Grazie
- Beckett, Katherine 1997. *Making crime pay: Law and order in contemporary American politics*. Oxford, UK: Oxford University Press.
- Bigo D. (2008) Security: a field left fallow. In Dillon, M and Neal A (Eds.). *Foucault on Politics Security and War* (pp.). New York, NY: Palgrave MacMillan
- Cassese, A. (2002): Terrorism is also disrupting some crucial Categories of international Law. Retrieved from <http://www.ejil.org/article.php?article=1558&issue=38> (accessed April 2013)
- Christie, N (1986). Suitable Enemies. In H Bianchi and R van Swaaningen (Eds.). *Abolitionism: Towards a non-repressive approach to crime* (pp). Amsterdam: Free University Press. .
- Dean, M (2007): *Governing Societies. Political Perspectives on Domestic and International Rule*. New York: Open University.
- Deflem, M (2010): *the Policing of Terrorism*. London: Routledge.

Dillon, M and J. Reid (2009) *The Liberal Way of War*. London: Routledge.

Dillon, M and Neal A (2008) (eds) *Foucault on Politics Security and War*. New York:
Palgrave MacMillan

Foucault, M. (1977): *Discipline and Punish*. London: Penguin Books. Original Title:
Surveiller et Punir: Naissance de la Prison [1975]

Foucault, M (1979): *History of Sexuality. An Introduction. Vol. 1*. London: Allen Lane.

Foucault, M (1991): "Governmentality" in Graham Burchell, Colin Gordon and Peter Miller (eds)
The Foucault Effect. Studies in Governmentality. Chicago: University of
Chicago Press.

Foucault, M (1994): "Truth and the Juridical Form" in Faubion, J. (ed) *Power: Foucault. The
Essential Works of Foucault 1954-1984*. London: Penguin.

Foucault, M. (2003): *Society Must Be Defended. Lectures at the College the France 1975-
1976*. New York: Picador

Foucault, M (2007): *Security Territory Population: Lectures at the College the France 1977-
1978*. England and United States: Palgrave Macmillan

Garland, D (1888) "British Criminology before 1935" In *British Journal of Criminology*, 28:
2, 1-18.

Green P and Ward T (2004) *State Crime: Government, Violence and Corruption*. London:
Pluto Press.

Hall, et al, (1978) *Policing the Crisis: Mugging, The state and law and Order*. London: Palgrave

Hayward, R. and W. Morrison (2002) "Locating Ground Zero: Caught Between the Narratives of War
and Crime" in Strawson, J (ed) *Law After Ground Zero*. London:
Glass House.

Huq, Z. Aziz, and Christopher Muller. 2008. "The War on Crime as Precursor to the War on
Terror" in *International Journal of Law, Crime and Justice* 36: 215-229.

Jabri, V (2007): *War and the Transformation of Global Politics*. New York; Palgrave Mac

Millan

Jamieson, Ruth (1998): "Toward a Criminology of War in Europe", in Ruggiero Vincenzo, South
Niegel and Ian Taylor (eds) *The New European Criminology: Crime and Social Order in
Europe*. London: Routledge.

Kramer C R and Michalowski RJ (2005) War, Aggression and State Crime. *British Journal of
Criminology* 45: 446-469.

Kraska PB (2001) Crime Control as Warfare: Language Matters. In: Kraska PB (ed) *Militarising
the American Criminal Justice System. The Changing Roles of the Armed
Forces and the Police*. Boston: Northeastern University Press.

Krasmann S (2007) "The Enemy on the Border". *Punishment and Society* 9: 301-318.

Mannheim, H (1941) *War and Crime*. London: Watts and Co

Matza, D (1969) *Becoming Deviant*. Engle-Wood Cliffs: Prentice Hall

Megret, F. (2002): "War? Legal Semantics and the Move to Violence", *European Journal of
International Law*, 14: 327-345

Mouffe, C. (1998): "Carl Schmitt and the Paradox of Liberal Democracy" in Dyzenhaus D
(ed) *Law as Politics. Carl Schmitt's critique of Liberalism*. Durham and London:
Duke University Press.

Neal, A (2010) *Exceptionalism and the Politics of Counter Terrorism: Liberty, Security and the
War on Terror*. London: Routledge

Parenti, Christian. 1999. *Lockdown America. Police and Prison in the Age of Crisis*. London:
Verso.

reconfigured power and the absence of accountability" in *Crime, Law and Social Change* 47:
135-150.

Reid, J. (2006) *The Bio-politics of the War on Terror*. Manchester: Manchester University
Press

Rothe D and Mullins CW (2006) *Symbolic Gestures and the Generation of Global Social Control:*

The International Criminal Court. Plymouth: Lexington Books

Ruggiero V (2005) Criminilizing War: Criminology as Ceasefire. *Social and Legal Studies*

14: 239-257.

Sands P (2005) *Lawless World: America and the Making and Breaking of Global Rules.:*

London: Allen Lane Hallsworth and Lea

Schmitt C (2006) [1950] *The Nomos of the Earth in the International Law of the Jus*

Publicum Europeaum . New York: Telos.

Simon J (2007) *Governing Through Crime.* New York: Oxford University Press.

Simpson G (2007) *Law, War and Crime: War Crimes Trials and the Renovation of International*

Law. Cambridge: Polity

Slaughter A. and Burke-White, W (2002): "An International Constitutional Moment",

Harvard International Law Journal, vol. 43, 1: 1-21

Sparks R (2006) Ordinary Anxieties and States of Emergency: Statecraft and Spectatorship in the

New Politics of Insecurity. In: Armstrong S and McAra L (eds) *Perspectives on*

Punishment. The Contours of Control. Oxford: Oxford University Press.

Teitel, R (2011) *Humanity's Law.* United States: Oxford University Press

Welch, M. (2007) "Sovereign Impunity in America's War on Terror: examining Reconfigured Power

and the Absence of Accountability" in *Crime, Law and Social Change*, vol. 47: 135-150